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**UNITED STATES DISTRICT COURT**

**DISTRICT OF NEVADA**

REBECCA MOLE-DONCHEZ,

Plaintiff,

v.

JEH JOHNSON, *et al.*,

Defendants.

Case No. 2:13-cv-00847-APG-NJK

**MOTION REQUESTING EXCEPTION TO EARLY NEUTRAL  
EVALUATION SESSION ATTENDANCE REQUIREMENT**

**I. INTRODUCTION**

An Early Neutral Evaluation (“ENE”) in this case is scheduled for November 21, 2014, at 9:30 a.m. before United States Magistrate Judge Peggy Leen (ECF #35). The Order setting the Settlement Conference provides:

In the case of non-individual parties, counsel shall arrange for a representative with binding authority to settle this matter up to the full amount of the claim to be present for the duration of the ENE session....

A request for an exception to the above attendance requirements must be filed and served at least one week prior to the ENE session. Counsel of record, individual parties, and a fully authorized representative shall appear in person unless the court enters an order granting a request for exception.

1 The United States requests that the Court authorize Assistant United States Attorney Troy Flake  
2 to participate in the ENE in person as the sole settlement representative for the Government.

## 3 **II. ARGUMENT**

4 The United States Supreme Court has stated that the federal Government is unlike any other  
5 litigant:

6 We have long recognized that the Government is not in a position identical to that of a private  
7 litigant, both because of the geographic breadth of government litigation and also, most  
8 importantly, because of the nature of the issues the government litigates. It is not open to  
9 serious dispute that the government is a party to a far greater number of cases on a nationwide  
10 basis than even the most litigious private entity.

11 *United States v. Mendoza*, 464 U.S. 154, 159 (1984) (internal citation omitted).

12 Because the Government handles a very large number of cases, it would be impractical, if not  
13 physically impossible, for those with settlement authority for the full claim amount to prepare for and  
14 appear at all settlement conferences. *United States v. U.S. Dist. Court*, 694 F.3d 1051, 1059 (9th Cir.  
15 2012) (district court abused its discretion in ordering a Government representative with full settlement  
16 authority to appear in person for an initial settlement conference). The Advisory Committee notes that  
17 accompany the 1993 amendments to Federal Rule of Civil Procedure 16 acknowledge the unique  
18 position of the Government in that regard: “Particularly in litigation in which governmental agencies ...  
19 are involved, there may be no one with on-the-spot settlement authority, and the most that should be  
20 expected is access to a person who would have a major role in submitting a recommendation to the body  
21 or board with ultimate decision-making responsibility.” *Id.* at 1060.

22 The Government delegates settlement authority to select individuals in order to promote  
23 centralized decision-making. *Id.* at 1059. Centralized decision-making promotes three important  
24 Government objectives. *Id.* at 1060. First, it allows the Government to act consistently in important  
25 cases. *Id.* Second, it allows the executive branch to pursue policy goals more effectively by placing  
26 ultimate authority in the hands of a few officials. *Id.* Third, by giving authority to high-ranking officials,  
centralized decision-making better promotes political accountability. *Id.*

1 In light of those principles, the Ninth Circuit has determined that the courts should adopt a  
2 “practical approach” in deciding whether to require a Government representative with full settlement  
3 authority to attend a pretrial conference. *Id.* at 1061. In the Ninth Circuit’s view, the courts should  
4 consider less drastic steps, such as telephonic participation, before requiring in-person participation. *Id.*  
5 Only as a “last resort” should the District Court require an official with full settlement authority to  
6 participate in a pretrial conference in person. *Id.*

7 The ultimate authority to settle this case rests with the United States Attorney, the Civil Division  
8 Chief, or higher ranking officials within the Department of Justice (“DOJ”), depending on whether the  
9 client agency and DOJ officials agree with the proposed resolution. 28 C.F.R. § 0.168(a). It is simply not  
10 feasible, however, for these officials to attend each and every settlement conference or ENE. Moreover,  
11 Assistant United States Attorneys routinely participate in settlement conferences and ENEs in this  
12 district as sole settlement representatives for the Government. In fact, the Government has utilized this  
13 approach with much success for many years and, as a result, hundreds of cases involving the United  
14 States have settled.

15 Accordingly, the United States respectfully requests that the Court authorize Assistant United  
16 States Attorney Flake to participate in the ENE in person as the sole settlement representative for the  
17 Government. He will ensure that the case is thoroughly evaluated by the appropriate Government  
18 officials in advance of the settlement conference so as to provide meaningful participation.  
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1 **III. CONCLUSION**

2 For the reasons above, the United States respectfully requests that the Court permit Assistant  
3 United States Attorney Flake to participate in the ENE scheduled for November 21, 2014, as the sole  
4 settlement representative for the Government.

5 Respectfully submitted this 14th day of November 2014.

6 DANIEL G. BOGDEN  
7 United States Attorney

8 /s/ Troy K. Flake  
9 TROY K. FLAKE  
10 Assistant United States Attorney

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17 IT IS SO ORDERED:

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20 UNITED STATES DISTRICT JUDGE  
21 UNITED STATES MAGISTRATE JUDGE

22 DATED: November 17, 2014  
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**PROOF OF SERVICE**

I, Troy K. Flake, certify that the following individual was served with a copy of the **MOTION REQUESTING EXCEPTION TO EARLY NEUTRAL EVALUATION SESSION ATTENDANCE REQUIREMENT** on the date and via the method of service indicated below:

**Electronic Case Filing:**

Michael P. Kimbrell  
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Dated: November 14, 2014.

/s/ Troy K. Flake

TROY K. FLAKE  
Assistant United States Attorney